

Gary J.

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION                    )  
FOR BENEFICIAL WATER USE PERMIT                    )     FINAL ORDER  
NO. 29428-s76N BY DONALD W. AND                    )  
MERVYN ENGEL    )

\* \* \* \* \*

RESPONSE TO EXCEPTIONS FILED  
TO PROPOSAL FOR DECISION

An objection to the Proposal for Decision in this matter was filed by Robert L. Fletcher on behalf of Darrel Hall, an objector to this Application.

(1) Objection: That the proposal for decision failed to address the failure of a spring on Mr. Hall's property in relation to the Applicant's diversion of water.

Response: See additional Finding of Fact No. 19. Mr. Hall's spring dried up two (2) years after the Applicant began using water (Finding of Fact No. 10) in a low water year (Finding of Fact No. 13). Therefore, it is not clear whether or not the failure of Mr. Hall's spring is attributable to the Applicant's diversion or the lack of available water. No evidence was presented by any parties as to why Mr. Hall's spring remained dry while other objectors' springs appear to dry up and then recover (see Finding of Fact No. 15). The burden of proof on the

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Applicant in this matter is substantial credible evidence; the record shows that the Applicant has met this burden.

(2) Objection: That the Findings of Fact failed to address Mr. Wetzel's testimony regarding the possibility of bypassing a recharge zone.

Response: Mr. Wetzel's testimony was that the pipeline did not appear to be bypassing a recharge zone as evidenced by standing water all along the pipeline (see additional Finding of Fact No. 20). Mr. Wetzel did state that if it was first assumed that the pipeline bypassed a recharge zone, then it would necessarily follow that the objectors would have problems. Mr. Wetzel did not feel that the requisite assumption was valid, however.

#### ADDITIONAL FINDINGS OF FACT

19. That a spring on the easterly edge of Objector Darrel Hall's property went dry in the fall of 1977.

20. The Applicants' pipeline does not appear to be bypassing a recharge zone since there was standing water along the entire length of the line on May 12, 1982.

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There being no further exceptions to the Proposal for Decision in this matter, the Proposed Findings of Fact, Additional Findings of Fact, Proposed Conclusions of Law and Proposed Order are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

#### FINAL ORDER

Application for Beneficial Water Use Permit No. 29428-s76N by Donald W. and Mervyn Engel is hereby granted to appropriate 601.4 gallons per minute up to 970 acre-feet per annum for power generation and fish and wildlife purposes from January 1, to December 31, inclusive, of each year. The water is to be diverted by means of dams from two springs in the NE1/4 NW1/4 SE1/4 of Section 20, Township 26 North, Range 32 West, Sanders County, M.P.M. The water is to be used in the SW1/4 NW1/4 SE1/4 of said Section 20. The priority date for this Permit shall be May 2, 1980, at 2:30 p.m.

This permit is issued subject to the following express conditions, restrictions and limitations:

1. This permit is subject to all prior and existing rights in the source of supply and any final determination of these rights as provided by Montana law.

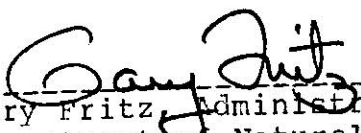
2. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused by the

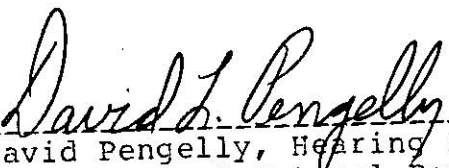
exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 16th day of August, 1982.

  
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Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 449 - 2872

  
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David Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
NO. 29428-s76N BY DONALD W. AND	)	
MERVYN ENGEL	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and the contested case provisions of the Administrative Procedures Act, a hearing in the above-entitled matter was held in Thompson Falls, Montana, on May 12, 1982. The Applicant appeared personally at the hearing through Donald Engel. Objectors Shelia Karp (Sheila Karp Graeber), and Herb and Jean Rohling, appeared at the hearing and were represented by counsel Robert Fletcher of Thompson Falls, Montana. Objectors LeRoy and Lola Magoffin and Darrell Hall appeared personally at the hearing. Objectors Dale Rasmussen, Keith Rush, and Wade Nelson were not present at the hearing, however, Mr. Ivan Rasmussen presented testimony at the hearing on their behalf. Also, Mr. Rush sent a letter to the hearing examiner regarding his objection. The Department of Natural Resources and Conservation (DNRC) was represented by Chuck Brasen and Jim Rehbein of the Department's Kalispell Field Office, and Wayne Wetzal of the Technical Section of the Water Management Bureau, DNRC.

## STATEMENT OF THE CASE

On May 2, 1980, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Donald W. and Mervyn Engel. This Application seeks 608.26 gallons per minute up to 976.05 acre-feet per annum. The Application seeks 1.86 gpm up to 3.00 acre-feet for domestic purposes from January 1 to December 31; 0.05 acre-feet per annum for stock-watering purposes from January 1 to December 31; 5 gallons per minute up to 3.00 acre-feet per annum for new sprinkler irrigation on one (1) acre from May 1 to September 30; and 601.40 gallons per minute up to 970 acre-feet per annum for power generation and fish and wildlife purposes from January 1 to December 31. The point of diversion is in the NE1/4 NW1/4 SE1/4 of Section 20, Township 26 North, Range 32 West, Sanders County, M.P.M. The place of use for the proposed application is the SW1/4 NW1/4 SE1/4 of said Section 20.

The pertinent portions of this application were duly published for three (3) successive weeks in the Sanders County Ledger, a newspaper of general circulation printed and published in Thompson Falls, Montana.

The following persons filed timely objections to this Application with the Department on the dates stated:

Darrell R. Hall	November 18, 1980
Dale B. Rasmussen	November 19, 1980
Wade H. Nelsen	November 20, 1980

Keith Rush	November 21, 1980
Shelia Karp	November 24, 1980
Herb & Jean Rohling	December 1, 1980
LeRoy & Lola Magoffin	December 2, 1980

#### EXHIBITS

The Applicant offered into evidence the following exhibits,  
to-wit:

- (A-1) A hand-drawn sketch of the proposed project with an attached set of written specifications for the project.
- (A-2) A photocopy of an aerial photo of the general area with the Applicant's lands outlined in red and the location of several of the objectors' springs also marked.
- (A-3) A photocopy of a 1967 aerial photo of the general area with the boundaries of the Miller Gulch drainage outlined in green.
- (A-4) A photocopy of a U.S. Geological Survey quad map showing the general location of the proposed project.
- (A-5) A sheet of flow calculations made on September 28, 1975, purporting to show a diversion through the Applicant's system of 177.6 gallons per minute of water.
- (A-6) Graphical and tabular total annual precipitation data for Heron.
- (A-7) Graphical and tabular total annual precipitation for Trout Creek Ranger Station.

- (A-8) Graphical and tabular mean annual discharge data for the Bull River.
- (A-9) Graphical and tabular mean annual discharge data for the Clark Fork River below Noxon Rapids Dam.
- (A-10) Photocopies of U.S. Weather Bureau precipitation and departures from normal records for western Montana from 1971 through 1980, including records for Heron and Trout Creek Ranger Station.
- (A-11) Graphical representation of total annual precipitation at the Thompson Falls power house.
- (A-12) Graphical and tabular records of mean annual discharge for the Thompson River.
- (A-13) Graphical and tabular records for mean annual discharge for Prospect Creek.
- (A-14) Graphical display of winter precipitation data for Heron, Montana.

The Applicant's exhibits were received into the record with no objections.

The Objectors offered the following exhibits into the record, to-wit:

- (O-1) A copy of the Sanders County tract book for Section 20, Township 26 North, Range 32 West, M.P.M., with an attached page giving the description of the owners of the various tracts in this section.
- (O-2) A graphical display of the discharge of Objector Rohling's spring prepared from data collected from October of 1980 through May of 1982.



- (O-3) Acknowledgment of Claim Nos. 352 and 353 filed by Shelia Karp for domestic and irrigation purposes, respectively.
- (O-4) A portion of Sanders County tract book for Section 29, Township 26 North, Range 32 West, M.P.M., with an attached sheet listing the names of the owners of the tracts shown.
- (O-5) Temperature and precipitation data from June of 1981 through May of 1982 collected by Mr. Rohling.
- (O-6) Certificate of Water Right No. 8968-g76N issued to Stewart Hampton for a ground water well in the SE1/4 SW1/4 of Section 20, Township 26 North, Range 32 West, M.P.M., Sanders County.
- (O-7) Well log report No. 8968-g76N for well owner Stewart Hampton for a well located in the SE1/4 SW1/4 of Section 20, Township 26 North, Range 32 West, M.P.M., Sanders County.

The Objectors' exhibits were received into the record with no objections.

The Department offered one exhibit into the record, to-wit:

- (D-1) Memorandum to Rich Moy from Wayne Wetzel regarding Application No. 29428 prepared on May 11, 1982.

The Department's Exhibit was received into the record with no objection.

Based on the information contained in the Department's file in this matter and the information presented at the hearing, the Hearing Examiner makes the following Findings of Fact, Conclusions of Law and Order:

#### FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

3. The Applicant's proposed use of water for power generation and fish and wildlife purposes at a rate of 601.4 gallons per minute up to 970 acre-feet per annum is a beneficial use of water.

4. The source of water for the proposed diversion is two (2) springs located in the NE1/4 NW1/4 SE1/4 of Section 20, Township 26 North, Range 32 West, M.P.M., Sanders County, Montana. The springs are located in what is commonly known as Miller Gulch.

5. The water will be used for power generation and fish and wildlife purposes in the SW1/4 NW1/4 SE1/4 of Section 20, Township 26 North, Range 32 West, M.P.M., Sanders County.

6. The Applicant intends to divert the waters claimed herein by means of diversion dams, and convey the water by means of an eight-inch pipeline. Very little water would be lost in the conveyance of this water. This system is adequate for the Applicant's intended purposes and no water would be wasted by such a diversion.

7. The Applicant's proposed point of diversion and place of use are located within an alluvial fan.

8. The Applicant's fish pond serves as a ground water recharge zone.

9. The source of water for the Objector's springs is Miller Gulch.

10. The Applicant has been diverting water from one of the two springs since 1975.

11. There is no evidence of a change in ground water flow patterns since the Applicant began diverting water in 1975 such as the appearance of new springs in the area.

12. The Objectors have had problems with their springs prior to the time in 1975 when the Applicant began using water:

- (a) Mr. Rasmussen had trouble with his spring in 1970.
- (b) Mr. Rasmussen's spring dried up in 1973.
- (c) A Mr. Hampton (predecessor in interest to the Magoffins) drilled a well in 1973 (see Exhibit No. O-7) due to the low flow of a spring being used for domestic purposes until that time. The Hampton well was not properly recorded until 1976. (See Exhibit No. O-6).

13. The years 1970, 1973, 1975, and 1977, were all years in which the Objectors experienced problems with their springs.

14. 1973 and 1977 were low water years as evidenced by the precipitation and stream flow discharge data presented by the Applicant. (See Exhibit Nos. A-6 through A-14).

15. The hydrologic system operating in the Miller Gulch area down to the Objectors' springs appears to have a very quick response time as evidenced by the dramatic increase in flow of

Mr. Rohling's spring which appears to coincide with the increased precipitation in the area. (See Exhibit Nos. O-2 and O-5).

16. The Applicant's diversion does not appear to affect Mr. Rohling's spring in that Mr. Rohling's spring discharge did not appear to respond with the shut-down of the Applicant's system from October of 1981 to February of 1982.

17. The Objectors' springs have experienced low flows in response to low water availability rather than the diversion of water by the Applicant.

18. There are no planned uses or developments for which permits have been issued or for which water has been reserved that would be potentially affected by the Applicant's proposed use of this water.

#### CONCLUSIONS OF LAW

1. MCA 85-2-311, 1979, directs the Department of Natural Resources and Conservation to issue a water use permit if the following conditions or criteria exist:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

2. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

3. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

4. The Applicant's intended use of water for power generation and for fish and wildlife purposes is a beneficial use.

5. The Applicant's proposed means of diversion and construction are adequate.

6. The Applicant's proposed use of this water will not adversely affect the rights of prior appropriators in the source of supply.

7. The Applicant will not unreasonably affect developments for which permits have been issued nor for which waters have been reserved.

8. The Application does not exceed 10,000 acre-feet per annum nor 15 cubic feet per second, therefore, the Applicant need not prove by clear and convincing evidence that the rights of a prior appropriator will be adversely affected.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued.

#### ORDER

Application for Beneficial Water Use Permit No. 29428-s76N by Donald W. and Mervyn Engel is hereby granted to appropriate 601.4 gallons per minute up to 978 acre-feet per annum for power generation and fish and wildlife purposes from January 1, to December 31, inclusive, of each year. The water is to be diverted by means of dams from two springs in the NE1/4 NW1/4 SE1/4 of Section 20, Township 26 North, Range 32 West, Sanders County, M.P.M. The water is to be used in the SW1/4 NW1/4 SE1/4 of said Section 20. The priority date for this Permit shall be May 2, 1980, at 2:30 p.m.

This permit is issued subject to the following express conditions, restrictions and limitations:

1. This permit is subject to all prior and existing rights in the source of supply and any final determination of these rights as provided by Montana law.

2. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

3. The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to the terms and conditions may result in the revocation of this permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before August 9, 1982.

DONE this 23rd day of July, 1982.

David L. Pengelly

David Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation

32 S. Ewing, Helena, MT 59620

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